

SENATE RECORD VOTE ANALYSIS

104th Congress
1st Session

Vote No. 144

May 2, 1995, 1:04 p.m.
Page S-5941 Temp. Record

PRODUCT LIABILITY/Health Care Liability Reform

SUBJECT: Product Liability Fairness Act . . . H.R. 956. McConnell amendment No. 603, as amended, to the Gorton substitute amendment No. 596.

ACTION: AMENDMENT AGREED TO, 53-47

SYNOPSIS: As passed by the House, H.R. 956, the Product Liability Fairness Act, will establish uniform Federal and State civil litigation standards for product liability cases and other civil cases, including medical malpractice actions.

The Gorton substitute amendment would apply only to Federal and State civil product liability cases. It would abolish the doctrine of joint liability for noneconomic damages, would create a consistent standard for the award of punitive damages, and would limit punitive damage awards.

The McConnell amendment, as amended, would reform Federal and State medical malpractice laws as follows:

- joint liability for noneconomic and punitive damages would be eliminated (the trier of fact would determine the percentage of liability for each defendant);
- medical liability punitive damage awards would be capped at 2 times the sum of economic and noneconomic losses (see vote No. 139);
- Product liability punitive damage awards would be capped at 2 times the sum of economic and noneconomic losses;
- punitive damage awards could not be given without clear and convincing evidence that the defendant: intended to injure the claimant for a reason unrelated to the provision of health care services; understood the claimant was substantially certain to suffer unnecessary injury and deliberately failed to avoid such injury; or acted with a conscious, flagrant disregard of a substantial and unjustifiable risk of unnecessary injury;
- punitive damage awards could not be given in cases in which compensatory awards in excess of \$500 were not given;
- at the request of any defendant, the trier of fact would hold a separate hearing to determine if punitive damages should be awarded and how much, or to determine how much damages to award after a determination of punitive liability has been made;
- at the request of either party, awards in excess of \$100,000 would be made on a periodic basis, though the adjudicating body

(See other side)

YEAS (53)			NAYS (47)			NOT VOTING (0)	
Republicans (48 or 89%)		Democrats (5 or 11%)	Republicans (6 or 11%)	Democrats (41 or 89%)		Republicans (0)	Democrats (0)
Abraham	Helms	Exon	Cohen	Akaka	Hollings		
Ashcroft	Hutchison	Feinstein	D'Amato	Baucus	Inouye		
Bennett	Inhofe	Lieberman	Packwood	Biden	Johnston		
Bond	Jeffords	Nunn	Shelby	Bingaman	Kennedy		
Brown	Kassebaum	Robb	Specter	Boxer	Kerrey		
Burns	Kempthorne		Thompson	Bradley	Kerry		
Campbell	Kyl			Breaux	Kohl		
Chafee	Lott			Bryan	Lautenberg		
Coats	Lugar			Bumpers	Leahy		
Cochran	Mack			Byrd	Levin		
Coverdell	McCain			Conrad	Mikulski		
Craig	McConnell			Daschle	Moseley-Braun		
DeWine	Murkowski			Dodd	Moynihan		
Dole	Nickles			Dorgan	Murray		
Domenici	Pressler			Feingold	Pell		
Faircloth	Roth			Ford	Pryor		
Frist	Santorum			Glenn	Reid		
Gorton	Simpson			Graham	Rockefeller		
Gramm	Smith			Harkin	Sarbanes		
Grams	Snowe			Heflin	Simon		
Grassley	Stevens				Wellstone		
Gregg	Thomas						
Hatch	Thurmond						
Hatfield	Warner						

EXPLANATION OF ABSENCE:

- 1—Official Business
- 2—Necessarily Absent
- 3—Illness
- 4—Other

SYMBOLS:

- AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

could waive this requirement in the interests of justice;

- a 2-year statute of limitations would be set, starting from the time of discovery of an injury;
- State laws would be preempted only to the extent that they are inconsistent with the provisions of this amendment, though certain State laws containing greater restrictions, including State laws containing lower caps for noneconomic damage awards, punitive damage awards, and attorney fees, would not be preempted;
- awards would be reduced by the amount of compensation received from collateral sources;
- attorney contingency fees would be limited to of the first \$150,000 recovered and of any additional amount recovered;
- clear and convincing evidence of malpractice would be necessary to order an award in a labor and delivery case if the doctor providing the care had not provided treatment prior to the delivery (see vote No. 137);
- provisions of this amendment would not apply to actions involving sexual abuse;
- the Attorney General would be permitted to award grants for establishing or maintaining alternative dispute resolution mechanisms;
- at least 50 percent of all punitive damages awarded for medical malpractice would be used for the licensing, investigating, disciplining, and certification of health care professionals and for the reduction of malpractice-related costs for health care providers volunteering to provide services in medically underserved areas; and
- an advisory panel on the quality, safety, and effectiveness of health care services would be created.

Those favoring the amendment contended:

The McConnell amendment would expand the scope of this bill to address the medical malpractice crisis that exists in America today. It would cap punitive damages, eliminate joint liability for noneconomic damages, limit attorney fees, and enact other overdue reforms. Passing this amendment would cure many of the deformities in our current malpractice system, thereby making health care more accessible and affordable for all Americans. Some Senators have complained that this amendment is too extreme, others have objected that it is extraneous to the subject of the bill, while still others have argued that it violates States' rights. None of these objections has merit. The amendment is needed and should be passed.

The reforms this amendment would enact are straightforward. First, punitive damages would be capped at 2 times the sum of compensatory losses. Standards for awarding such damages would be set, and proceedings on them could be separated from other proceedings. Further, at least 50 percent of any punitive damages awarded would have to go to the State for licensing and disciplining health care professionals, and for reducing malpractice costs for physicians who volunteer to work in underserved areas. We strongly applaud these provisions, which will end the lottery nature of the current system. Right now, punitive damages are rarely awarded, and when they are they are not ordinarily enormous, but in rare cases truly out-of-line judgments are made. The threat of being unjustly held responsible for tens of millions of dollars in damages hangs like the sword of Damocles over medical professionals' heads.

The next major reform in the amendment is that it would eliminate joint liability for noneconomic damages, including punitive damages. Just as in the underlying product liability legislation, defendants would only be responsible for their proportionate share of the harm caused. This reform is necessary to stop the search for "deep pockets." Under current practices, a court may find an injured person to be 99 percent responsible for his or her injury, and his or her physician 1 percent responsible, and may then order the physician to pay 100 percent of the bills under the joint liability doctrine. The practical effect of the joint liability doctrine is that whoever has the most money, instead of whoever is the most guilty, pays the most. Still, the McConnell amendment reform is modest. It would only apply to noneconomic damages, including punitive damages. Economic losses would still be joint. Thus, if the injured person in the above example had millions of dollars in medical bills, his or her doctor could still be forced to foot the entire bill. Only subjective damages (noneconomic losses and punitive) would be several.

The third major reform in the McConnell amendment is that it would limit attorney fees in contingency cases to of the first \$150,000 awarded and 1/4 of any additional amount. This reform would result in injured parties receiving more of the amount they need to compensate them for their losses. Under current practices, lawyers often take more than 50 percent. Other reforms the amendment would make include the right to make periodic payment of large damage awards and the adoption of the collateral source rule. These reforms are noncontroversial.

Each of the above listed reforms would help reduce medical costs and make health care more accessible. Doctors who justly fear punitive damage and joint liability suits (one out of every three doctors will be sued during their careers) order batteries of expensive tests for their patients to guard against the remotest possibilities. Failing to do so would hold them open to multi-million judgements. The result is that Americans must pay ever higher medical bills for treatments they do not really need. Another reaction of doctors to punitive damage awards and joint liability suits is to quit their practices. In field such as obstetrics, which are more subject to suits, the result has been a severe shortage of medical practitioners. The limits on punitive damages and joint liability in the McConnell amendment would reduce doctors' concerns, leading to lower medical costs and more practitioners. The lower attorney fees demanded by the amendment would be beneficial for doctors and patients alike. They would both discourage ambulance-chasing lawyers from filing meritless suits and would provide injured parties with larger shares of the awards they need to compensate them for their losses.

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Some Senators have decried the supposed extremism of the McConnell amendment. In our view the amendment is very mild. For example, very few cases each year would ever reach the punitive damages cap that it would impose. Only the most exorbitant awards would be reduced. Frankly, some of us would have preferred to do away with punitive damages altogether because we find inherently problematic the notion that someone may be punished by a court without being afforded the constitutional protections that are provided in criminal trials. Several States have totally banned the award of punitive damages, and we hope more States will follow suit.

Another argument that has been raised against the amendment is that it is on an extraneous subject. However, medical malpractice and product liability cases are frequently connected. For example, it is common for a plaintiff to file suit against a doctor, a hospital, and a medical products manufacturer in a case. Without the McConnell amendment, it would be necessary to sue the manufacturer under the rules specified in this bill, and to sue the doctor and hospital under current malpractice laws. Thus, a case on the same set of facts would have to be tried under two separate regimens of law. In our opinion, it would be unwise to pass product liability reform without passing medical liability reform because of the further complexity that action would introduce into civil law.

Many Senators, most of whom have never before expressed an interest in States' rights, have vigorously opposed this amendment because it would set Federal standards on malpractice that States would have to follow. We reject this analysis for several reasons. First, we are not changing the substantive law of negligence. Each State's law would remain the same. Second, we are not creating a Federal cause of action. Third, we believe that setting national health care standards is a legitimate Federal exercise because health care is a national issue. Medical products and drugs move in interstate commerce; health maintenance organizations are primarily national; a huge part of the health care field--Medicaid, Medicare, and Federal employee health plans--is under Federal control. With this amendment, the interstate nature of medicine will be recognized. The health care liability system in one State will no longer be able to destroy the practices of health care professionals in other States whose practices cross State lines.

The limits in the McConnell amendment are reasonable, they are in accordance with federalist principles, and they will prove beneficial for doctors and their patients, including those patients who are victims of malpractice. Trial lawyers will lose some funds, but everyone else will benefit. We are pleased to vote in favor of this amendment.

Those opposing the amendment contended:

Medical malpractice reform should not be attached as a rider to this bill. We favor some modest reforms as part of a comprehensive overhaul of our health care system, but we certainly do not favor passing the extreme positions contained in the McConnell amendment. These positions would not reform our malpractice tort laws--they would run roughshod over them in defense of incompetent health care providers.

Millions of Americans have no health insurance and millions more will lose their coverage because costs are spiraling out of control. Last year the country spent \$1 trillion on health care, and that number will double in 10 years. The reasons for the escalating costs are varied and complex, but they are not principally due to malpractice costs.

Though malpractice reform is needed, it is hardly the major problem of our current health care system. Malpractice premiums amount to only six-tenths of 1 percent of the Nation's health care costs. Fewer than 2 percent of malpractice victims ever file suit, and the rate of medical malpractice claims has been declining since 1985. According to Business Week, only 1 out of 15 medical tort filings results in an award. According to the New York Times, the size of awards dropped precipitously last year. These statistics prove that reforming malpractice liability laws will not solve the health care crisis in America.

Reforming the laws as proposed by the McConnell amendment would not only fail to solve the health care crisis, it would put the lives of millions of Americans at risk by providing protection to substandard doctors and hospitals. The amendment has four basic problems. First, it would set an impossibly high standard for awarding punitive damages, and then it would impose a cap. We do not think, for example, that doctors who botch operations because they are drunk, or who fraudulently practice medicine after losing their licenses, should have caps placed on the amount that they can be punished. We especially oppose caps because they are discriminatory; 68 percent of all punitive awards are given to women. Second, the McConnell amendment would severely limit the longstanding legal doctrine of joint and several liability. If a person suffers a grievous injury and the party most at fault is unable to pay, a party that bears less fault should have pay the first party's share of the damages. The only alternative, which is followed by the McConnell amendment, is to leave the victim partially compensated. We strongly favor holding any party partially at fault responsible for all the damages if need be, and thus oppose this aspect of the McConnell amendment. Third, the amendment would fail to give consumers information on judgments against doctors. We think any true malpractice reform should guarantee Americans access to doctors' records so they can stay away from incompetent practitioners. Finally, the McConnell amendment would unevenly preempt State tort laws. If State laws are going to be preempted, the result should at least be to create a national standard. However, the McConnell amendment would not create uniformity because it would allow States to enact even greater restrictions on the right to sue doctors.

According to researchers at the Harvard School of Public Health, 80,000 Americans die in hospitals each year from the negligence of physicians or other health providers, and an additional 1.3 million are injured. As many as a quarter of those deaths could have been prevented with proper medical care. As we have already noted, the victims of this malpractice are not contributing greatly to

health care costs by suing to recover damages. We do not see any justification for limiting the rights of these Americans to sue their doctors as proposed in the McConnell amendment. We therefore urge our colleagues to join us in rejecting it.